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DEPARTMENT OF ECOLOGY

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May 11, 2020

New Source Review Group  
Mail Drop C504-03  
U.S. Environmental Protection Agency  
Research Triangle Park, NC 27711

Re: The Washington State Department of Ecology Comments on the U.S. Environmental Protection Agency's draft guidance, "Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations."

To Whom It May Concern:

The Washington State Department of Ecology (Ecology) submits the following comments on the U.S. Environmental Protection Agency's (EPA) draft guidance, "Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations."

**Introduction.**

EPA is introducing a new interpretation of the phrase "begin actual construction" as it appears in rules implementing the New Source Review (NSR) permitting program. 40 CFR 52.21(b)(11) defines "begin actual construction" as:

*"Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change."*

The regulation also provides that no owner or operator of a new major stationary source or a source undertaking a major modification shall "begin actual construction" before obtaining an NSR permit.

EPA's longstanding and consistent interpretation of this language has been that construction activities could not proceed prior to obtaining an NSR permit for any construction that is

“costly,” that “significantly alters the site,” and/or is “permanent in nature.” The same interpretation also prohibited any preconstruction “intended to accommodate an emissions unit,” or which is an “integral part of the source or modification.”

Ecology believes that EPA’s draft guidance erroneously ignores the agency’s own longstanding and consistent interpretation of the language, which will have significant and lasting negative impacts on efforts to protect air quality and reduce greenhouse gas (GHG) emissions in Washington State. In this comment letter, Ecology reviews a number of shortcomings in the draft guidance including eschewed interpretations of existing definitions in the regulation, undermining public participation in the permit review process, and weakening the Prevention of Significant Deterioration (PSD) review process of secondary emissions. Each of these undermine the primary purposes of EPA’s New Source Review regulations to protect human health and the environment.

**The draft guidance ignores the regulatory definition of “construction.”**

EPA’s draft guidance would eschew the current EPA interpretation of the term “begin actual construction” for the major NSR program by saying that it does not entirely comport with a plain language reading of the long-standing regulatory definition of that term. Furthermore, EPA’s new plain reading does not conform to the regulatory text as a whole, as EPA has chosen to acknowledge only portions of the regulatory text that support this desired change while ignoring the portions that do not.

EPA’s draft guidance on “begin actual construction” is focused on the “what” is beginning to be constructed (e.g. an emission unit) and not on the definition of what “construction” means. “Construction” is defined in 40 CFR 52.21(b)(8) as “any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.”

The core of the construction definition is “any physical change or change in the method of operation that would result in a change in emissions.” The definition provides supplemental examples that this includes, but is not limited to, the “fabrication, erection, installation, demolition, or modification of an emissions unit.” EPA’s draft guidance, because it is *limited solely to an emissions unit*, inappropriately restricts the definition of construction to the smaller subset of examples, and ignores the full definition, which includes “any physical change or change in method of operation that would result in a change of emissions.” The current interpretation of “begin actual construction” recognizes the full and complete regulatory definition of “construction” and is therefore sound guidance that is consistent with the regulation.

Looking at the definition of “construction” exclusive of the parenthesis yields an understanding that construction is anything that results in the change of emissions. This makes good sense. For example, underground pipes would not be defined as an emission unit per the definition in 40 CFR 52.21(b)(7). However, an increase in pipe diameter could result in the movement of more product, creating an increase in production, followed by increased emissions. In this scenario, the changes to the underground pipes would be a physical change that results in an emission change, so we would consider that construction. Therefore, under 40 CFR 52.21(b)(8), beginning actual

construction needs to encompass work on the underground pipes. EPA's new draft guidance, however, would exclude such work, contrary to the definitions of "construction" and "begin actual construction" in 40 CFR 52.21(b).

**The draft guidance undermines public participation in the permitting process.**

Both Ecology and Washington State's local clean air agencies are required to solicit input from members of the public and other stakeholders as part of the NSR permitting process *before* issuing a permit. Allowing a source or an operator to start extensive construction activities on a facility prior to obtaining a permit negates the ability of the public and stakeholders to influence the construction process of the facility. This change renders the public comment period moot, as a source or operator could construct everything but emission units before issuance of a permit and the beginning of the public comment process. EPA's draft guidance undermines meaningful public participation, permitting authority credibility with their constituents, and public trust in the permitting process.

**The draft guidance means PSD review will fail to account for secondary emissions.**

The Clean Air Act requires that PSD review include a detailed and extensive air quality impact assessment of the effects of a source. Under this draft guidance, key pieces of PSD review related to secondary emissions would be weakened significantly.

Section 40 CFR 52.21(b)(18) defines secondary emissions as emissions that "do not come from the major stationary source or modification itself" and "include emissions from any offsite support facility." Section 40 CFR 52.21(k) requires source impact analyses showing that new or modified sources and their primary and secondary emissions would not cause or contribute to violations of NAAQS or applicable maximum allowable increases in any area. Furthermore, 42 U.S. Code § 7475 (Preconstruction Requirements) dictates that there must be an analysis of any air quality impacts as a result of a facility's expansion.

EPA's proposed guidance allowing a facility to commence construction on "non-emission unit" structures prior to obtaining a pre-construction permit fails to account for the requirement of a facility to perform a source impact analysis, which must include analysis of secondary emissions. If a facility is allowed to construct non-emission units before obtaining a permit, the required analysis of secondary emissions will not be possible prior to permit issuance and changes that may be needed regarding secondary emissions will be problematic. The proposed guidance does not address this significant problem with its approach and is flawed for this reason as well.

**The draft guidance creates barriers around changing or correcting pre-permit construction.**

Pre-permit deployment of equity provides the source with a lever to influence permitting decisions. The acknowledgment that it might become more difficult for an air agency to deny issuance of a permit once a source has placed significant "equity in the ground" influenced EPA's current guidance and interpretation of "begin actual construction." EPA states in the draft guidance that this rationale "is of less concern today" as the more "equity" a permit applicant places in the ground "the less leverage, as a practical matter, that applicant would retain in the permitting process."

This logic fails to take into account that facility retrofits and modifications will always cost more compared to the cost of new construction without such modifications or retrofits. A facility that follows EPA's draft guidance could start and finish construction of "non-emission units" before consideration of the type of emission unit has been established, where the unit would be physically located, how the unit will interact with and affect the rest of the facility, and other related impacts. Under this scenario, a facility could expend significant capital on the construction or modification of "non-emission unit" prior to the approval of a permit, only to see additional non-anticipated costs required under a final permit.

Once significant construction activities have begun on a facility, owners and operators become less willing and/or able to make design changes. Contrary to EPA's assertion in the draft guidance that any pre-permit construction is "at their own risk," the ability of owners and operators to bring political leverage to bear on the permitting decision increases with "equity in the ground." Many larger projects may involve public funds in terms of tax incentives, bonds, grants, or other funds that could be put at risk should the applicant decide to proceed down this path. Thus, EPA's draft guidance would remove the insulation from these dynamics that EPA's current longstanding interpretation of "begin actual construction" provides.

**Conclusion.**

EPA's draft guidance is not binding on Ecology because Washington State has an approved PSD program and NSR State Implementation Plan. Ecology is concerned that this revised interpretation will have significant indirect impacts on our state that will lead to undesirable and significant inconsistencies in the implementation of the NSR program, which is a vital part of our work to improve air quality and reduce the negative impacts of climate change. Ecology urges EPA to reconsider the guidance.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact Philip M. Gent at [Philip.Gent@ecy.wa.gov](mailto:Philip.Gent@ecy.wa.gov) or at (360) 407-6810.

Sincerely,



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